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No. 797

In the Supreme Court of the United States

OCTOBER TERM, 1958

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO AND MAGIE L. STONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The letter opinion (Pet. App. 8–9) and the findings of fact and conclusions of law (A. 2–5)[1] of the district court are not reported. The prior opinion of the court of appeals is reported at 242 F. 2d 359, and the opinion of this Court remanding the case to the court of appeals is reported at 356 U.S. 595. The opinion of the court of appeals on remand (Pet. App. 1–7) is not as yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1959 (Pet. App. 7). The petition for

[1] "A" refers to the appellants' appendix in the court of appeals on remand; "R.", to the original record in the court of appeals.

a writ of certiorari was filed on March 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the award of $2000 to the United States under the civil False Claims Act for each of thirty separate false claims presented by petitioners to the Commodity Credit Corporation violated due process of law.

STATUTE INVOLVED

The civil False Claims Act (12 Stat. 696, 698, R.S. 3490, 5438, 31 U.S.C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance

> of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

Petitioners, a corporation and its three principal directors, officers, and shareholders, were engaged in the business of cotton ginning and warehousing in Emporia, Virginia (A. 2–4). On August 3, 1948, the Commodity Credit Corporation entered into a Lending Agency Agreement with the petitioner corporation, pursuant to the Stabilization Act of 1942 (56 Stat. 765, 767) and the Commodity Credit Corporation Charter Act (62 Stat. 1070). The agreement authorized the corporation, as Commodity's agent, to make non-recourse loans to producers of eligible 1948 crop cotton (A. 3). Together with the applicable Department of Agriculture regulations (1948 Cotton Loan Instructions, 13 F.R. 4338), it also authorized the corporation to obtain executed Cotton Producers' Notes, as well as warehouse receipts covering the cotton pledged by the borrower producers as security for the loans (R. 4–5).

Each note was required to contain, *inter alia*, a certification by its maker that he had produced the cotton on which the loan was to be made (R. 4). The Agreement provided that the agent would disburse the face amounts of the notes and thereafter transmit the notes

to Commodity (R. 5). Commodity, in turn, would repay the agent the amounts which it had previously disbursed plus interest at the rate of 1½ percent per annum from the date of the execution of the notes to the date of payment by Commodity (R. 5). The Agreement required the agent, in transmitting the notes, to certify that the representations by the maker were true to the best of the agent's knowledge and belief and that the cotton listed on the note was "eligible" cotton as defined in the 1948 Cotton Loan Instructions (R. 4–7).

Between September 1, 1948 and November 30, 1948, petitioners induced a number of bona fide cotton producers to sign more than 280 cotton producer note forms in blank (R. 6). On these forms, petitioners listed the warehouse receipt numbers of cotton which petitioners had purchased from various sources, but which had not been produced by the makers of the notes (R. 6). The forms were completed by petitioners with the following statements falsely certified therein: that the note makers had produced the cotton; that the benefits of the loan evidenced by the notes would accrue solely to the note makers and any tenants and sharecroppers having an interest in the cotton; and that the benefits of the loan had not been transferred to any other party (R. 7). In addition, petitioner Magie L. Stone, acting with the knowledge and consent of the other petitioners, made the required certification with respect to each note that the above statements (purportedly made by the producers) were correct to the best of her knowledge and belief, and that the cotton was "eligible" (R. 7–8).

Petitioners received payment on the fraudulent notes together with 1½ percent interest—the fee provided as compensation for the use of the money purportedly disbursed by them to the producers (R. 8). Petitioners made no disbursements to the producers—the latter having no interest in the pledged cotton—but rather retained for themselves the Commodity payments (R. 8).

On October 28, 1953, the United States brought this suit under the False Claims Act, 31 U.S.C. 231, in the District Court for the Eastern District of Virginia. The amended complaint sought $2,000 for each false claim submitted by petitioners and double damages, as prescribed by the Act. Following trial, the district court found (A. 4) that petitioners had transmitted false notes to the Commodity Credit Corporation in thirty letters of transmittal, each of which contained at least one fraudulent note. It determined that each of these letters, along with the accompanying notes, constituted a false claim upon the United States under the False Claims Act, and held petitioners "jointly and severally liable to the United States of America in the amount of a Two Thousand Dollar ($2,000.00) forfeiture for each of the * * * thirty (30) letters of transmittal * * *". (A. 5).

The Government's complaint had alleged that, as the result of petitioners' fraud, it had suffered a net loss, after sale of the cotton, of $31,598.59 and had paid $129.29 as interest to which petitioners were not entitled (R. 28). The district court found, however,

that the cotton had been held by Commodity "for an unreasonably long time, during which time it could have disposed of the said cotton at a profit" and that Commodity "failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation" (A. 4). On the basis of these findings it held that the Government "has not suffered any legally recoverable damages due to the actions of the defendants" (A. 5).[3] The court further concluded that, notwithstanding the fact that the United States had suffered no actual damages which were "legally recoverable," the "recovery by plaintiff of Sixty Thousand Dollars ($60,000.00) in forfeitures is Constitutional as a civil remedy * * *" (A. 5).

The court of appeals first reversed on the sole ground that a false claim against the Commodity Credit Corporation is not within the ambit of the False Claims Act. 242 F. 2d 359. This Court reversed that decision *sub nom. United States* v. *McNinch*, 356 U.S. 595, and remanded the cause to the court of appeals "for further proceedings not inconsistent with this opinion." 356 U.S. at 600.

On remand, petitioners contended that, in view of the district court's unappealed finding that the Government had suffered no "legally recoverable" damages, the $60,000 judgment deprived them of property without due process of law in contravention of the Fifth Amendment. The court of appeals rejected this argument and affirmed the judgment of the dis-

[3] No appeal was taken by the Government from this determination.

trict court.[3] It held that the district court's finding was not to be construed as a determination that the Government had not been injured and legally damaged by petitioners' fraud, stating that "the judge meant no more than that no calculable damage was shown." (Pet. App. 3). Observing that "no proof is required to convince one that to the Government a false claim, successful or not, is always costly", it concluded (Pet. App. 3):

> For a single false claim $2,000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate. Obviously, the Congress in fixing this sum as the amount of the forfeiture cannot be justly accused of taking it without cause or due process.

ARGUMENT

Petitioners contend that the $60,000 recovery is so disproportionate to any possible damage suffered by the Government that the Act as so applied violates the due process clause of the Fifth Amendment.[4] The district court did not, however, as petitioners contend,

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[3] The opinion of the court of appeals also disposed of the appeal and cross-appeal in *Toepleman* v. *United States*, which had been remanded by this Court along with the instant case.

[4] Petitioners also contend (Pet. 9) that the judgment is unconstitutional as an "excessive fine" under the Eighth Amendment. This point was not raised in either of the courts below and is therefore not before this Court. In any event, the considerations which require rejection of petitioners' claim under the Fifth Amendment would apply with equal force to their claim under the Eighth Amendment.

find that the Government suffered no injury from the fraud. It found only that, because of its failure to mitigate damages by promptly selling the cotton or accepting petitioners' offer to repurchase it, the Government could "not recover for any loss sustained in the sale of the cotton" (Pet. App. 9)—*i.e.*, it had not sustained any "legally recoverable" damages (A.5). That finding, as the court of appeals observed, does not "exclude all injury and damages" but only provable damages (Pet. App. 3). It is fully consistent with the existence of unprovable elements of injury justifying the statutory recovery—*e.g.*, the unjust enrichment to the defrauder, the inevitable but immeasurable damage to the public interest, and the Government's costs of administration and enforcement. Here, moreover, the Government admittedly suffered a direct financial loss of $31,598.59 on the sale of the cotton. That loss was no less real because not separately recoverable and negatives any claimed disparity between the recovery and the damage to the Government.

In any event, neither a showing nor a finding of possible damage to the Government is required to support the statutory damages provided for by the False Claims Act. It is established by the decisions of this Court that the prescribed damages of $2,000 represent a reasonable approximation by Congress of the incalculable injury likely to result from such false claims. As such, they may be recovered as liquidated damages whether or not actual damage can be shown in the particular case. In *United States ex rel.*

Marcus v. *Hess*, 317 U.S. 537, the Court, recognizing that the damages sustained by the Government from violations of the False Claims Act are difficult of precise ascertainment, confirmed the reasonableness of the $2,000 provision. It held (pp. 551–553):

> • • • We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. • • • The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.

Similarly, in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, the Court upheld an award of fixed statutory damages of $2,000 for each of five transactions in which the defendant had violated Section 26(b)(1) of the Surplus Property Act of 1944, 58 Stat. 765, stating (350 U.S. at 152–153):

> • • • The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss; • • • there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in *Marcus*. • • •

See also *Kofler* v. *United States*, No. 362, this Term, decided April 20, 1959. These cases clearly establish that proof of actual damage is irrelevant. Indeed, as this Court observed in *Rex Trailer*, the decision in *Marcus* had upheld an award of statutory damages on several claims which in fact had never been paid

by the Government and on which, for that reason, no actual damage could be shown. 350 U.S. at 153, n. 5.[8]

The damages awarded here were based upon 30 separate and distinct violations of the False Claims Act. Although the 30 letters of transmittal contained a total of 748 notes (A. 4) of which undoubtedly more than 30 were fraudulent, only a single statutory recovery was sought and granted for each transmittal letter. Whether or not each fraudulent note submitted to Commodity for payment could constitute an independent fraud, clearly each transmittal letter, submitting different notes at different times over a three-month period, was a distinct and individualized fraud for which the allowance of the statutory damages was both reasonable and proper.

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[8] As petitioners themselves concede, the lower federal courts have also uniformly held that the United States may recover $2,000 for each false claim under the False Claims Act despite the fact that actual "damages have not been alleged or [as in this case] if alleged have not been recovered for failure of proof" (Pet. 7). See, *e.g.*, *United States* v. *Rainwater*, 244 F. 2d 27, 28 (C.A. 8), affirmed, 356 U.S. 590; *United States* v. *National Wholesalers*, 236 F. 2d 944 (C.A. 9), certiorari denied, 353 U.S. 930; *United States* v. *Tieger*, 234 F. 2d 589, 590 (C.A. 3), certiorari denied, 352 U.S. 941; *United States* v. *Rohleder*, 157 F. 2d 126 (C.A. 3); *United States* v. *Ben Grunstein & Sons Co.*, 127 F. Supp. 907, 912 (D.N.J.); *United States* v. *Johnston*, 138 F. Supp. 525, 528 (W.D. Okla.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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